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In the Supreme Court of the United States

OCTOBER TERM, 1990

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the University of North Carolina is subject to institution-wide coverage under Executive Order No. 11,246, Section 503 of the Rehabilitation Act, 29 U.S.C. 793, and the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. 2012, by virtue of federal contracts held by some but not all of its 16 campus components.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-16A) is reported at 917 F.2d 812. The opinion of the district court (Pet. App. 22A-38A) is reported at 722 F. Supp. 1301. The opinion of the Acting Secretary of Labor (Pet. App. 41A-52A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1990. A petition for rehearing was denied on December 19, 1990 (Pet. App. 17A-19A). The petition for a writ of certiorari was filed on

February 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Board of Governors of the University of North Carolina (UNC) is "known and distinguished by the name of 'the University of North Carolina'" and is a "body politic and corporate." N.C. Gen. Stat. § 116-3 (1987). It is composed of 16 "constituent institutions" or campuses, including petitioners University of North Carolina at Asheville and the North Carolina School of the Arts. *Id.* § 116.4. The UNC Board of Governors is responsible for "the general determination, control, supervision, management and governance of all affairs of the constituent institutions." *Id.* § 116-11. As part of this responsibility, the Board determines the academic mission, the enrollment level, and the tuition at each campus; it appoints each campus's senior administrative staff and tenured faculty; and it prepares one budget for the entire university system. *Ibid.* The Board also selects the President of UNC, who is its "chief administrative officer." *Id.* § 116-14.

Each UNC campus has a board of trustees and a chancellor. The board of trustees of each campus has only those powers delegated to it by the Board of Governors. N.C. Gen. Stat. § 116-33 (1987). Similarly, the chancellor of each campus exercises executive authority over the campus "subject to the direction of the President." *Id.* § 116-34. The Board of Governors may delegate "any part of its authority over the affairs of any [constituent] institution to the board of trustees or, through the President, to the chancellor." *Id.* § 116-11(13). A delegation by

the Board "may be rescinded by the Board at any time in whole or in part." *Ibid.*

In accordance with this statutory framework, the President of UNC has established procedures that campuses must follow when they apply for federal contracts. Pet. App. 4A-5A. Under those procedures, the President must approve in advance any contract proposal that falls into one of five specified categories. *Id.* at 4A & n.1. Other proposals may be submitted to a federal contracting agency without the President's prior approval. *Id.* at 5A. In such cases, however, the campus must send a copy of the proposal to the President, who may at any time direct its withdrawal, revision, or amendment. *Ibid.* Acting under these procedures, 11 of the 16 UNC campuses have entered into contracts with federal agencies. *Ibid.* Petitioners University of North Carolina at Asheville and North Carolina School of the Arts are two of the campuses that have not. *Ibid.*

2. Executive Order No. 11,246, as amended, prohibits a federal "contractor" from discriminating in its hiring practices on the basis of race, color, religion, sex, or national origin. 3 C.F.R. 167 (Supp. 1965). The Order also requires the contractor to take "affirmative action" to ensure equal employment opportunity for members of these protected groups. *Ibid.* Section 503 of the Rehabilitation Act, 29 U.S.C. 793, and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), 38 U.S.C. 2012, require a "party contracting with the United States" to take similar affirmative steps on behalf of the handicapped and certain categories of veterans. These laws are collectively known as the "contract compliance laws."

The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor is re-

sponsible for enforcing the contract compliance laws. Pet. App. 6A. To ensure compliance, OFCCP conducts periodic reviews at the facilities of federal contractors. *Ibid.*

3. In 1981, OFCCP initiated a compliance review at the University of North Carolina at Asheville and at the North Carolina School of the Arts. Pet. App. 6A. When petitioners refused to cooperate with the investigations, OFCCP filed an administrative complaint against them. *Ibid.* Petitioners contended that they were not federal contractors because they had not made any federal contracts in their own names. *Ibid.*

The Acting Secretary of Labor rejected this contention and ordered petitioners to allow OFCCP to conduct its compliance reviews. Pet. App. 41A-52A. The Acting Secretary determined that, under state law, the University of North Carolina and its 16 campuses constitute a single state agency. He accordingly held that, when UNC campuses are awarded contracts, UNC is properly viewed as the "contractor" for purposes of the federal contract compliance laws, and therefore all of its campuses must comply with those laws. *Id.* at 43A-47A. The Acting Secretary rejected the notion that the campuses were converted into independent contractors when UNC delegated to them the authority to contract in their own names. He explained that, under state law, campuses contract only as agents of UNC; state law confers the power to contract on UNC, not on its constituent campuses. *Id.* at 46A-47A.

4. Petitioners sued in the United States District Court for the Eastern District of North Carolina, seeking review of the Acting Secretary's order under the Administrative Procedure Act, 5 U.S.C. 706. The

district court set aside the order, finding that it was "not in accordance with law" (*ibid.*). The court determined that only entities that have signed contracts in their own names are subject to coverage under the federal contract compliance laws. Since petitioners had not made any contracts in their own names, the court concluded, they are not covered by the contract compliance laws. Pet. App. 33A-36A.

5. The Fourth Circuit reversed. Pet. App. 1A-16A. It agreed with the Acting Secretary that, under North Carolina law, the University of North Carolina is one state agency and not sixteen separate agencies, and therefore may be treated as a single contractor for purposes of the contract compliance laws. *Id.* at 9A. The court held that, "[i]n ruling that the campuses that had entered federal contracts had done so as agents of UNC, the Acting Secretary merely stated what clearly appears from an examination of the relevant North Carolina statutes." *Id.* at 12A-13A.[1]

Judge Widener dissented, essentially adopting the district court's reasoning. Pet. App. 14A-16A.

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[1] The court of appeals rejected petitioners' argument that they were exempt from the contract compliance laws under regulations providing that those laws "shall not be applicable to any agency, instrumentality or subdivision of [state] government which does not participate in work on or under the contract or subcontract." Pet. App. 12A (quoting 41 C.F.R. 60-1.5(a)(4)). The court explained that these regulations "do[] not operate to exempt the non-contracting campuses of UNC because the state statutory scheme constitutes them as mere components of UNC, rather than as an 'agency, instrumentality, or subdivision of [state] government' that is independent of UNC." *Ibid.* (bracketed text supplied by court of appeals).

ARGUMENT

The court of appeals held that the University of North Carolina is subject to institution-wide coverage under the federal contract compliance laws. That holding is firmly grounded in North Carolina law, and is consistent with the contract compliance laws and the Department of Labor's regulations. No conflict with the decision of any other court of appeals exists or is asserted to exist. Further review is therefore unwarranted.

1. For purposes of the contract compliance laws, Department of Labor regulations define a government contractor to include any "State or local government, and any agency, instrumentality, or subdivision of such a government." 41 C.F.R. 60-1.3 (Exec. Order No. 11,246), 60-250.2 (VEVRAA), and 60-741.2 (Section 503 of Rehabilitation Act). The Department of Labor construes these definitional regulations to mean that every *independent* unit of a state or local government has a distinct contracting identity but that *components* of such a unit do not. Pet. App. 47A, 50A. Accordingly, when the components of a state agency, instrumentality, or subdivision are awarded federal contracts, the entire agency, instrumentality, or subdivision is treated as the contractor. *Ibid.*

The Department of Labor's definitional regulations operate in tandem with a second set of regulations providing that "[t]he requirements of the equal opportunity clause * * * shall not be applicable to any agency, instrumentality or subdivision * * * which does not participate in work on or under the contract." 41 C.F.R. 60-1.5(a)(4) (Exec. Order No. 11,246), 60-250.3(a)(4) (VEVRAA regulation, which substitutes "affirmative action clause" for

"equal opportunity clause"), and 60-741-3(a)(4) (Rehabilitation Act regulation, also substituting "affirmative action clause" for "equal opportunity clause"). The Department of Labor construes these regulations to mean that the contract of one independent agency does not subject another independent agency to coverage, unless the latter performs contract work. Pet. App. 47A. As the court of appeals recognized (*id.* at 12A), because the components of a contracting agency do not fall within the terms of this second set of regulations, those components are subject to coverage whether or not they work on the contract. To decide whether a particular entity is an independent agency or is instead an agency component, the Department of Labor follows state law. *Id.* at 45A-47A.

Petitioners contend (Pet. 15-19) that, because the individual campuses are separate state agencies, only campuses that sign contracts or perform work under them are subject to coverage under Department of Labor regulations. But as the Fourth Circuit concluded after a comprehensive review of North Carolina law (Pet. App. 9A-11A), the individual campuses are *not* separate state agencies. Instead, they are simply components of petitioner UNC.[2] Accord-

[2] As detailed by the Fourth Circuit (Pet. App. 9A-11A), the state statutory scheme establishes UNC as a body politic and corporate; the campuses have no such status. UNC has the power to sue and be sued; the campuses do not. The statute describes UNC as being "composed of" the sixteen campuses and refers to the campuses as "constituent" parts of UNC. The statute gives UNC's Board of Governors complete authority to manage the affairs of the campuses; the campuses have only the authority that the Board of Governors delegates to them. Moreover, the North Carolina Supreme Court has described UNC as a single governmental

ingly, under the regulations issued by the Department of Labor, when contracts are awarded to UNC campuses, UNC is the relevant contracting "agency" and all of its constituent campuses are subject to the coverage of the contract compliance laws. The issue of state law underpinning that conclusion does not warrant review by this Court. *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

2. Petitioners argue (Pet. 9-15) that the court of appeals' holding is inconsistent with the language in the contract compliance laws that imposes obligations on the "contractor" and the "party contracting with the United States." According to petitioners (Pet. 12), the term "contractor" can mean only one thing: the person named in the contract. The meaning of the term "contractor," however, is not so limited. That term can also refer to the party with ultimate control over the person named in the contract. For example, when a contract is made in the name of an agent, the principal is considered the "contractor." *Ford* v. *Williams*, 62 U.S. (21 How.) 287 (1858); Restatement (Second) of Agency §§ 149, 186, 190 (1958).

The Fourth Circuit correctly concluded (Pet. App. 9A-10A) that under North Carolina law the present situation is analogous to that of an agent contracting on behalf of a principal. Under the state statutory scheme, UNC has complete control over the affairs of the constituent campuses. Accordingly, when UNC delegates authority to its campuses to contract, and

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entity. See Pet. App. 10A-11A (discussing *Student Bar Ass'n* v. *Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977)).

the campuses act pursuant to that delegation, the campuses necessarily contract on behalf of UNC and are subject to UNC's continuing control. As the court of appeals stated (*id.* at 12A-13A), "[i]n ruling that the campuses that had entered federal contracts had done so as agents of UNC, the Acting Secretary merely stated what clearly appears from an examination of the relevant North Carolina statutes."[3] As the Fourth Circuit concluded, UNC is therefore the "contractor," even though the contracts were signed by individual campuses.[4]

3. Finally, petitioners argue (Pet. 19-25) that the Fourth Circuit's decision conflicts with the principle that Congress and the Executive Branch must speak clearly when they wish to impose conditions on the States. That argument is without merit. The contract compliance laws clearly make "affirmative action" a mandatory requirement; there can be no claim that these laws are merely precatory. Cf. *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 19 (1981). Moreover, the contract compliance laws extend this requirement to all government contractors

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[3] Petitioners criticize the Department of Labor's reliance on state law, asserting (Pet. 24) that it will produce anomalous results. That criticism is misguided. Under petitioners' own interpretation, state law will determine what entity is named in the contract and, therefore, what portion of a State's operations is subject to the contract compliance laws. Petitioners' criticism thus provides no basis for preferring their interpretation to the Department of Labor's.

[4] Petitioners contend (Pet. 22-24) that the agency analogy is imperfect since UNC and its campuses have not expressly agreed that the campuses would contract as agents of UNC. Because the state statutory scheme itself creates the agency relationship, however, there is no need for an express agreement.

without exception. Accordingly, when a state agency contracts with a federal agency, it is clearly subject to the obligations imposed by these laws. See *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 155-157 (1983); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936).

To be sure, the language of these laws does not definitively resolve the precise question presented here: whether the relevant "contractor" in this setting is the entire university system or only the specific campuses awarded contracts. But as we have seen, the State's own legal scheme indicates that UNC is the contractor by virtue of its right to control the contracting process. In any event, statutory language cannot eliminate all uncertainty in how laws will be applied. Once it is clear that States are subject to a statutory command, those charged with enforcing the laws have discretion to resolve issues of application. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Here, the Department of Labor's regulations, together with general principles of agency law, gave UNC sufficient reason to anticipate that its campuses' contracts entered into by its campuses would subject the entire university system to the coverage of the contract compliance laws. This Court's decisions require no more.[5]

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[5] There is no inconsistency between the court of appeals' decision and this Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, this Court held that the nondiscrimination obligations in the federal financial assistance statutes extend only to the specific programs in a university system that are federally assisted. That holding turned on the "program or activity" language in those stat-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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utes. *Grove City*, 465 U.S. at 570-574. No corresponding language appears in the contract compliance laws. After this Court's decision in *Grove City*, Congress amended the federal financial assistance statutes to extend their nondiscrimination requirements to an entire university system when any part of it receives assistance. Pub. L. No. 100-259, 102 Stat. 28 (1988). See also S. Rep. No. 64, 100th Cong., 1st Sess. 4 (1987).

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